No 99-901

Supreme Court, U.S.
FILED
DEC 30 1999
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

BRENTWOOD ACADEMY,

Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

W. OVID COLLINS, JR.
CORNELIUS & COLLINS, LLP
Suite 2700, Nashville City Center
511 Union Street
P.O. Box 190695
Nashville, Tennessee 37219
Phone: (615) 244-1440

Counsel of Record

CHARLES HAMPTON WHITE
RICHARD L. COLBERT
CORNELIUS & COLLINS, LLP
Suite 2700, Nashville City Center
511 Union Street
P.O. Box 190695
Nashville, Tennessee 37219
Phone: (615) 244-1440
Fax: (314) 721-0606

Attorneys for Respondents

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

2849

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT	6
I. THERE IS NO REAL SPLIT AMONG THE CIRCUITS	6
II. THE SIXTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF THIS COURT	9
III. SUPREME COURT REVIEW IS UNWARRANTED	17
CONCLUSION	21
CERTIFICATE OF SERVICE	23

TABLE OF AUTHORITIES

FEDERAL CASES

Allied Tube & Conduit Corporation v. Indianhead, Inc., 486, U.S. 492, 501 (1988) *15*

American Manufacturers Mutual Insurance Company v. Sullivan, 526 U.S. _____, 199 S. Ct. _____, 143 L. Ed. 2d 130 (1999). 8, 15, 20

Barnett v. Texas Wrestling Association, 16 F. Supp. 2d 690 (N. D. Tx. 1998) 8

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 13

Bingham v. Oregon School Activities Association, 37 F. Supp. 2d 1189 (D. Ore. 1999) 8

Blum v. Yaretsky, 457 U.S. 991 (1982) 6, 10, 11, 20

Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) 7

Brenden v. Independent School District 742, 477 F.2d 1292 (8th Cir. 1973) 6

Brewer v. Purvis, 816 F. Supp. 1560 (M.D. Ga. 1993) 8

Burrows v. Ohio High School Athletic Association, 891 F.2d 122 (6th Cir. 1989) 9

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 10

Clark v. Arizona Interscholastic Association, 695 F.2d 1126 (9th Cir. 1982) 7

Crane v. Indiana High School Athletic Association, 975 F.2d 1315 (7th Cir 1992) 8, 22

Crocker v. Tennessee Secondary School Athletic Association, 980 F.2d 382 (6th Cir. 1992) 19

Dennin v. Connecticut Interscholastic Athletic Conference, Inc., 913 F. Supp. 663 (D.Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996) 8

Griffin High School v. Illinois High School Association, 822 F.2d 671 (7th Cir. 1987) 6

Jackson v. Metropolitan Edison Company, 419 U.S. at 357-58 11

Jordan v. Indiana High School Athletic Association, 813 F. Supp. 1372 (N.D.Ind. 1993), *vacated as moot*, 16 F.3d 785 (7th Cir. 1994) 8

Libby v. South Inter-Conference Association, 728 F. Supp. 504 (N.D.Ill.), *affirmed*, 921 F.2d 96 (7th Cir. 1990) 8

Louisiana High School Athletic Association v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968) 6

Lugar v. Edmondson Oil Company, 457 U.S. 922 (1982) 6, 10, 11, 20

Monroe v. Pape, 365 U.S. 167 (1961) 9

Moreland v. Western Pennsylvania Interscholastic Athletic League, 572 F.2d 121 (3d Cir. 1978) 6

NCAA v. Smith, 119 S. Ct. 924 (1999) 20

NCAA v. Tarkanian, 488 U.S. 179 (1988) 12, 13, 14

O'Connell High School v. Virginia High School League, 581 F.2d 81 (4th Cir. 1978) 7

OHSAA v. Bray, 321 F.2d 269 (10th Cir. 1963) 21

Polk County v. Dodson, 454 U.S. 312 (1981) 9

Rendell-Baker v. Kohn, 457 U.S. 830 (1982) 6, 11

Robbins v. Indiana High School Athletic Association, 941 F. Supp. 786 (S.D.Ind. 1996) 8

San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987) 11

In re: United States ex rel. Missouri State High School Activities Association, 682 F.2d 147 (8th Cir. 1982) 6

United States v. Classic, 313 U.S. 299 (1941) 9

West v. Atkins, 487 U.S. 42 16

Yellow Springs Exempted Village School District Board of Education v. OHSAA, 647 F.2d 651 (6th Cir. 1981) 7

FEDERAL STATUTES

42 U.S.C. §1983 ..... 9, 10, 11, 15, 20, 21, 22

STATEMENT OF THE CASE

Although the Statement of the Case by the Petitioner Brentwood Academy ["Brentwood Academy"] bears some resemblance to the truth, Brentwood Academy has in many instances substituted hyperbole for fact, creating a distorted picture of the history and organization of the Tennessee Secondary School Athletic Association ["TSSAA"], the role of interscholastic athletics as a part of the public education process in Tennessee, and the effect of the TSSAA recruiting rule. When these distortions are corrected, Brentwood Academy's arguments for granting the petition lose whatever persuasive force they might otherwise have.

TSSAA is a private, not-for-profit, incorporated association. TSSAA is a voluntary association of public and private schools that have chosen to join together in order to self-regulate their interscholastic athletic competition. While the majority of the TSSAA member schools are in fact public schools, membership is open to secondary schools throughout the State of Tennessee, both public and private. However, no school, public or private, is compelled to maintain membership in TSSAA or to field teams for interscholastic athletic competition in any particular sport — or in any sport whatsoever.

TSSAA has been organized and in existence since 1925. The Tennessee State Board of Education *has not* recognized the functions of TSSAA in providing rules and regulations for interscholastic athletic competition among public schools in Tennessee since 1925. On the contrary, from 1925 until 1972, TSSAA operated without designation or recognition by the State Board of Education or any other governmental agency. It was not until 1972 that the State Board of Education first spoke to the issue of interscholastic athletic competition.

In 1972 the State Board of Education nominally approved the TSSAA rules and reserved a non-existent "right" to review and

approve changes to those rules. The promulgation of a rule by the State Board of Education recognizing the function of TSSAA had no effect on the manner in which TSSAA operated.

Just as it did before 1972 and as it has since, TSSAA operates in a representative fashion. The member schools elect a nine-member Legislative Council that serves a rule making function, and the member schools elect a nine-member Board of Control that has final authority to interpret and enforce the TSSAA rules. A principal, assistant principal or headmaster of a member school is eligible for election to either the Legislative Council or the Board of Control. Contrary to Brentwood Academy's assertion, there have been private school officials who have served on the Legislative Council and the Board of Control, and each representative body currently has at least one private school principal or headmaster.

The Board of Control elects an Executive Director who serves as a full-time administrative employee of TSSAA for a three year term. The Executive Director maintains the records and property of TSSAA, initiates investigations, conducts hearings, collects information, renders decisions, and fixes penalties based on the evidence, all in accordance with the rules and regulations of TSSAA. Ronnie Carter, the TSSAA Executive Director, renders decisions that are subject to review by the Board of Control if appealed by a voluntary member school. Carter and his staff are not government employees.

TSSAA's purpose is to stimulate and regulate the interscholastic athletic relations between its voluntary member schools. In order to accomplish its functions, TSSAA operates on a budget that includes approximately 1.6 million dollars in annual gross receipts. None of TSSAA's funds are derived from taxes imposed by state or local government authorities. Instead, TSSAA's funds are derived primarily from gate receipts of tournaments and playoffs which TSSAA sponsors for its mem-

ber schools. Only 4% of TSSAA's annual budget comes from the membership dues paid by member schools.

Despite the 1972 unilateral action of the State Board of Education, TSSAA has never sought State Board of Education approval of its rules or by-laws, and the State Board of Education has never attempted to control the operation of TSSAA. While the State Board of Education did on a few occasions take action to approve the TSSAA rules, the minutes of the State Board of Education reflect no consideration of the recruiting rule in particular or of any of the TSSAA rules in any detail. As former State Board of Education Chairman Brent Poulton described it, the Board's "approval" of TSSAA's rules on a few isolated occasions was simply "ceremonial," since the Board possessed no authority to control the operations of TSSAA and could not acquire that authority through the unilateral adoption of its 1972 resolution.

Consistent with Poulton's acknowledgment, the State Board of Education on February 28, 1996, amended its rule. As a result of this amendment, adopted more than a year before the operative events in this case, the State Board of Education no longer designates TSSAA for any purpose nor approves TSSAA's rules. Instead, the State Board of Education simply authorizes the public schools in Tennessee "to voluntarily maintain membership in the Tennessee Secondary School Athletic Association." Administrative Rule 0520-1-2-.08 of the State Board of Education of Tennessee.

There are no state laws requiring the public schools in Tennessee to join TSSAA or to engage in interscholastic athletic competition at all. The Tennessee statutes pertaining to public education, contained in Title 49 of the Tennessee Code, are silent with regard to interscholastic athletic competition. For both public and private schools, membership in TSSAA is optional, not compulsory. Brentwood Academy, a private school, volun-

tarily chooses to join TSSAA on an annual basis. In doing so, Brentwood Academy agrees each year that in exchange for the opportunity to compete for TSSAA championships, it will comply with the Constitution and By-Laws of TSSAA and with the decisions of the TSSAA Executive Director and Board of Control.

Among the TSSAA By-Laws is a rule that prohibits TSSAA member schools from recruiting student athletes "for athletic purposes." Article II, Section 21 of the TSSAA By-Laws provides:

> "The use of undue influence on a student (with or without an athletic record) the parents or guardians of a student by any person connected or not connected with the school to secure or retain a student ***for athletic purposes*** shall be a violation of the recruiting rule." [Emphasis supplied].

Contrary to the unfounded assertion Brentwood Academy has made at every step of this litigation, the recruiting rule does not impose a ban or absolute bar on contact between a school and a prospective student athlete.[1] The recruiting rule addresses communications directed at prospective athletes based on their status as prospective athletes. A form letter to all prospective students (not just eighth-grade boys who are candidates for the football team), which gives general school information, is a form of school-initiated communication that can be used to provide information about athletics without violating the recruiting rule. Information about athletics can be provided in response to inquiries from prospective students. Brentwood Academy can provide all the information it wishes about athletics, as well as any other aspect of its program, during visits to the school by prospective students. Brentwood Academy can place advertise-

---

[1] See, e.g., Petition pp. 2, 5, 11, 13.

ments in visual, audio, and print media to convey information about its athletic program. All of these types of communications can be initiated by Brentwood Academy without running afoul of the recruiting rule. As the "Guidelines for Understanding the Recruiting Rule and Understanding What Is 'Undue Influence'" in the TSSAA Handbook explain, the key to understanding the recruiting rule is the underlying purpose that athletes or prospective athletes be treated no differently than students who are not athletes, so that students are not singled out based on their potential athletic ability.

The recruiting rule violations that gave rise to this action were three-fold. First, the athletic director[2] at Brentwood Academy provided free passes to a middle school football coach, who in turn used the passes to gain free admission for two of his star middle school football players at a Brentwood Academy football game. Second, the Brentwood Academy athletic director sent a letter in the spring of 1997 to a dozen male students at various middle schools whose applications had been approved for enrollment the following year, inviting those students to attend spring football practice at Brentwood Academy. Third, the Brentwood Academy athletic director and football coach then contacted each of these male students by telephone to reiterate the invitation he had made by letter. None of the recruiting rule violations involved efforts by Brentwood Academy to communicate with students and their parents about "opportunities for educational enrichment." Each of the violations involved interaction, purely for athletic reasons, between the athletic director at Brentwood Academy and prospective student athletes enrolled at other schools.

---

[2] Carlton Flatt served as athletic director and head football coach at Brentwood Academy at all relevant times. Despite its relatively small enrollment, Brentwood Academy's football teams won a number of TSSAA state championships and received national publicity under Flatt's guidance.

ARGUMENT

I. THERE IS NO REAL SPLIT AMONG THE CIRCUITS.

Contrary to Brentwood Academy's insistence, there is no real conflict between this case and decisions of other federal appellate courts. In 1982, this Court issued three decisions which redefined the "state action" analysis in cases involving private party defendants. *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). These three cases, which explained how the state action analysis was to be conducted in cases involving private entities, came to be known as the *Blum* trilogy.[3]

At least three of the appellate decisions upon which Brentwood Academy relies, representing the Third, Fifth, and Eighth Circuits, were decided prior to the *Blum* trilogy.[4] Moreover, the post-*Blum* decisions upon which Brentwood Academy relies are inadequate to establish any division among the circuits.

In *Griffin High School v. Illinois High School Association*, 822 F.2d 671, 674 (7th Cir. 1987), state action was not in dispute, and the Court therefore undertook no analysis of the facts. In *In re: United States ex rel. Missouri State High School Activities*

---

[3] Although Brentwood Academy refers to TSSAA as a "nominally private" association, noticeably absent from Brentwood Academy's petition is any discussion of the *Blum* trilogy. Aside from a single citation to *Blum v. Yaretsky* in a footnote, there is no mention in the petition of these three seminal decisions which established the contours of the state action analysis required in this case.

[4] *Moreland v. Western Pennsylvania Interscholastic Athletic League*, 572 F.2d 121 (3d Cir. 1978); *Brenden v. Independent School District 742*, 477 F.2d 1292 (8th Cir. 1973); *Louisiana High School Athletic Association v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1968).

Association, 682 F.2d 147, 151 (8th Cir. 1982), the Court similarly omitted any analysis of the state action issue. The entire discussion of state action was contained in one sentence, where the only fact noted was that the MSHSAA was comprised primarily of public schools. In *Clark v. Arizona Interscholastic Association*, 695 F.2d 1126, 1128 (9th Cir. 1982), the state action issue was not raised by the parties. Although *Clark* was a post-*Blum* decision, the Ninth Circuit relied on *Yellow Springs Exempted Village School District Board of Education v. OHSAA*, 647 F.2d 651 (6th Cir. 1981), and other pre-*Blum* decisions, to support its finding of state action. *Clark* included no mention of the *Blum* trilogy.

Brentwood Academy also points to "controlling doctrine" in the Eleventh and Fourth Circuits to support its alleged inconsistency. The Eleventh Circuit "controlling doctrine" is not a case where the state action issue was considered, but is simply a case where the Eleventh Circuit adopted Fifth Circuit precedent when it split from the Fifth Circuit in October 1981.[5] The Fourth Circuit decision, a pre-*Blum* decision, included no substantive analysis of the state action issue since the parties stipulated the existence of state action.[6] Even the District Court cases relied upon by Brentwood Academy for having treated the state action

---

[5] *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

[6] *O'Connell High School v. Virginia High School League*, 581 F.2d 81 (4th Cir. 1978).

issue as "clearly established, settled law" are of no value in the state action analysis.[7]

Relying on the *Blum* trilogy, this Court recently reiterated that a finding of state action on the part of a private entity requires both an alleged constitutional deprivation caused by the exercise of a right or privilege created by the state or by a rule of conduct imposed by the state *and* that a party charged with the deprivation is a person who may fairly be said to be a state actor. *American Manufacturers Mutual Insurance Company v. Sullivan*, 526 U.S. 40, 119 S.Ct.977, 143 L.Ed.2d 130, 143-44 (1999). The only post-*Blum* decisions in which a high school athletic association's state actor status has been analyzed, rather than

---

[7] *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 913 F.Supp. 663 (D.Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996) (a single sentence, with no analysis, encompasses the entire state action discussion); *Robbins v. Indiana High School Athletic Association*, 941 F.Supp. 786 (S.D.Ind. 1996)(state action found without any factual analysis); *Brewer v. Purvis*, 816 F.Supp. 1560 (M.D.Ga. 1993)(state action found without any substantial factual inquiry and without reference to *Blum* trilogy tests for state action); *Libby v. South Inter-Conference Association*, 728 F.Supp. 504 (N.D.Ill.), *affirmed*, 921 F.2d 96 (7th Cir. 1990)(District Court found association to be a state actor without any analysis of the facts, and the Seventh Circuit decision was unrelated to the state action issue); *Crane v. Indiana High School Athletic Association*, 975 F.2d 1315 (7th Cir. 1992)(majority decision based solely on state law grounds, constitutional issues addressed only in dissent, with state action discussed in a parenthetical portion of one sentence in the dissent); *Bingham v. Oregon School Activities Association*, 37 F.Supp. 2d 1189 (D.Ore. 1999) (state action mentioned in a footnote that was dicta in this case under Title II of the Americans with Disabilities Act of 1990); *Barnett v. Texas Wrestling Association*, 16 F.Supp. 2d 690 (N.D.Tx. 1998) (on summary judgment, District Court simply concluded that there was an issue of material fact on the association's state actor status); *Jordan v. Indiana High School Athletic Association*, 813 F.Supp. 1372 (N.D.Ind. 1993), *vacated as moot*, 16 F.3d 785 (7th Cir. 1994) (recognizing that Judge Posner's dissent in Krane did not arise to a conclusive command by the Seventh Circuit on the state action issue).

simply accepted or assumed, both arise out of the Sixth Circuit. They include this case and *Burrows v. Ohio High School Athletic Association*, 891 F.2d 122 (6th Cir. 1989). There is no split among the circuits in cases where an athletic association's state actor status is analyzed under modern state action principles. The Sixth Circuit is the only circuit where such an analysis has occurred, and the Sixth Circuit has concluded that neither the OHSAA nor the TSSAA is a state actor.

II. THE SIXTH CIRCUIT'S DECISION IS CONSISTENT WITH DECISIONS OF THIS COURT.

Although a number of lower courts have assumed, without analysis, that high school athletic associations are state actors for purposes of the Fourteenth Amendment and 42 U.S.C. §1983, the Sixth Circuit's analysis of the state action issue and the result of that analysis are consistent with the decisions of this Court.

A person acts under color of state law for purposes of 42 U.S.C. §1983 only when exercising power that he possesses by virtue of state law and that is made possible only because he is clothed with the authority of state law. *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981); *Monroe v. Pape*, 365 U.S. 167 (1961); *United States v. Classic*, 313 U.S. 299, 326 (1941). TSSAA's power to regulate the interscholastic athletic competition engaged in by Brentwood Academy is power possessed solely because Brentwood Academy voluntarily chose to join TSSAA and is made possible only because Brentwood Academy made that choice. State law has nothing to do with TSSAA's power to regulate Brentwood Academy's interscholastic athletic competition.

In 1982, this Court issued the three decisions which comprise the *Blum* trilogy. The state actor status of a private individual or entity like TSSAA is to be determined in accordance with the principles announced in the *Blum* trilogy.

The requirement that a person act under color of state law for purposes of 42 U.S.C. §1983, like the requirement of "state action" under the Fourteenth Amendment, represents recognition that most rights secured by the Constitution are protected only against government infringement and not against private conduct. *Lugar v. Edmondson Oil Company*, *supra*, 457 U.S. at 936 (1982). The courts must carefully adhere to the state action requirement in order to avoid imposing the Constitution, federal law, and federal judicial power in areas where the framers of the Constitution intended to preserve individual freedom without government coercion. *Id.* The courts should be careful not to extend the Constitution beyond its intended reach by imposing their authority under 42 U.S.C. §1983 upon persons who are not truly acting under color of state law.

In *Blum v. Yaretsky*, *supra*, this Court considered a challenge to a private nursing home's discharge or transfer of Medicaid patients. The nursing home was extensively regulated by the State of New York. These regulations allegedly commanded the summary discharge or transfer of Medicaid patients under various circumstances. This Court held that the private nursing home was not a state actor and that the mere fact that the nursing home was subject to state regulation did not convert the nursing home's action into that of the state for purposes of the Fourteenth Amendment. *Id.* at 1004.

In *Blum* this Court explained that a private enterprise may be engaged in state action when the state exercises coercive power or provides such significant encouragement that the choice must in law be deemed to be that of the state or where the private entity exercises powers that are traditionally and exclusively reserved to the state. *Id.* at 1004-1005. Rejecting the "symbiotic relationship" argument from *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), this Court in *Blum* stated:

> "As we have previously held, privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*." *Blum*, 457 U.S. at 1011, (citing *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 357-58 (1974).

In *Jackson v. Metropolitan Edison Company*, relied on in *Blum*, this Court held that the *Burton* "symbiotic relationship" test was limited to circumstances where the private entity was a lessee of public property. *Jackson*, 419 U.S. at 357-58.

In *Rendell-Baker v. Kohn*, *supra*, another of the *Blum* trilogy cases, this Court again concluded that state regulation, even if "extensive and detailed," cannot convert private action into that of the state. *Id.* at 841. This Court rejected the argument that the private entity, a school, was serving a "public function," and instead focused its inquiry upon whether the function performed had been "traditionally the *exclusive* prerogative of the State." *Id.* at 842 (emphasis in original).

Under any analysis, for a defendant to be subject to suit under 42 U.S.C. §1983, that defendant's actions must be fairly attributable to the state. *Lugar*, 457 U.S. at 936. In view of this basic principle of state action analysis, this Court in 1987 decided *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), holding that the U.S. Olympic Committee was not a governmental actor bound by the constraints of the Constitution. This Court recognized that the USOC was a corporation established by federal law, that the law imposed certain requirements upon the USOC, that the USOC was granted exclusive use of the Olympic words and symbols by federal law, and that the USOC received direct federal funding grants. *Id.* at 542-43. Still, this Court held:

> "Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government . . . . Moreover, the intent on the part of Congress to help the USOC obtain funding does not change the analysis. The Government may subsidize private entities without assuming constitutional responsibility for their actions.
>
> * * *
>
> Certainly the activities performed by the USOC serve a national interest, as its objects and purposes of incorporation indicate. . . . The fact '[t]hat a private entity performs a function which serves the public does not make its acts a [governmental] action.'
>
> * * *
>
> ***Neither the conduct nor the coordination of amateur sports has been a traditional governmental function.***" *Id.* at 544-45 (emphasis supplied) (citations omitted).

Following the *United States Olympic Committee* decision, this Court decided *NCAA v. Tarkanian*, 488 U.S. 179 (1988), once again recognizing that the function of fostering amateur athletics was not a traditional, let alone an exclusive, state function. *Id.* at 197 n. 18. Of course, Brentwood Academy points to a single sentence of dicta in footnote 13 of the *Tarkanian* opinion as the end-all answer to the question of whether TSSAA is a state actor.

In the same footnote, the other sentence of dicta declares that even if the NCAA were a state actor, it would not be acting under color of state law in its relationships with private universities. *Id.* at 193 n. 13. Under this dicta, TSSAA would not be a state actor in its relationship with Brentwood Academy. Brentwood

Academy's myopic assessment of the significance of *Tarkanian* ignores even another sentence of dicta in the same footnote it treats as dispositive.

Of course, dicta in a footnote does not satisfy the requirement that the circumstances be examined closely, consistent with careful adherence to the state action requirement, when determining whether TSSAA is a state actor. When the circumstances are examined closely, consistent with careful adherence to the state action requirement, a number of important aspects in this Court's *Tarkanian* decision suggests that TSSAA should not be viewed as acting under color of state law in its relationship with Brentwood Academy. Like NCAA member schools, TSSAA member schools agree when joining the association that they will abide by and enforce the TSSAA rules. *Id.* at 183. These rules govern the conduct of interscholastic athletic programs of TSSAA members and, like the NCAA legislation, include limitations on the recruiting of student athletes. *Id.* Like the NCAA, TSSAA has enforcement procedures that are an essential part of the interscholastic athletic programs of its member schools. *Id.* at 184. The source of the TSSAA rules, like the source of the NCAA legislation, is the collective membership of the organization. *Id.* at 193. And while it must be assumed that public school members of TSSAA have had an impact on TSSAA's promulgation of its rules, it must also be assumed that independent and parochial school members of TSSAA have also participated in the promulgation of those rules. *Id.*

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this Court noted that the ABA's formulation of disciplinary rules was not state action even though the State Supreme Court adopted those rules in *toto* and enforced them against its members since the State Supreme Court "retained plenary power to reexamine those standards and, if necessary, to reject them and promulgate its own." *Tarkanian*, 488 U.S. at 194 (discussing *Bates v. State*

Bar of Arizona, *supra*). Similarly, this Court in *Tarkanian* noted that the UNLV's adoption of the NCAA's rules to govern its own behavior did not transform the NCAA into a state actor. *Id.* Using the same analysis, the unilateral decision in 1972 by the State Board of Education to approve TSSAA's rules and to designate TSSAA as the entity to regulate the interscholastic athletic relations to public high schools in Tennessee did not convert TSSAA's formulation of its rules into state action any more than the Supreme Court's enforcement in *Bates* converted the ABA's formulation of disciplinary rules into state action.

In *Tarkanian*, this Court also noted:

> "So here, UNLV retained the authority to withdraw from the NCAA and establish its own standards. The University alternatively could have stayed in the Association and worked through the Association's legislative process to amend rules or standards it deemed harsh, unfair, or unwieldy." *Tarkanian*, 488 U.S. at 194-95.

This Court recognized that the NCAA, like the TSSAA in this case, enjoyed no governmental powers to facilitate its investigation, such as the power to subpoena witnesses, impose contempt sanctions, or assert sovereign authority over any individual. *Id.* at 197. And, although the plaintiff in *Tarkanian* argued that the power of the NCAA was so great that UNLV had no practical alternative to compliance, this Court stated:

> "[E]ven if we assume that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under color of state law." *Id.* at 198-99.

The fact that non-membership in the association and the resulting inability to compete for association-sponsored cham-

pionships might be unpalatable does not make that option non-existent. *Id.* at 198 n. 19.

Like the NCAA, the TSSAA has no official authority that has been conferred upon it by the government. *Id.* at 193-94 (citing *Allied Tube & Conduit Corporation v. Indianhead, Inc.* 486 U.S. 492, 501 (1988)). The regulation of interscholastic athletic competition in Tennessee is not an activity traditionally and exclusively reserved to the state. *Id.* at 197 n. 18. In fact, TSSAA regulated the interscholastic athletic competition of its members for 47 years prior to any supposed state involvement through the unilateral adoption of the State Board of Education regulation. Brentwood Academy is under no compulsion to join TSSAA. *Id.* at 193 n. 13. And, while it may be unpalatable to Brentwood Academy to withdraw from TSSAA and no longer be in a position to hold itself out as a TSSAA football champion, Brentwood Academy nonetheless retains the option of withdrawing from TSSAA if it does not wish to comply with the TSSAA rules. *Id.* at 198-99, 198 n. 19.

In March 1999, this Court issued its decision in *American Manufacturers Mutual Insurance Company v. Sullivan, supra.* In *Sullivan* this Court once again acknowledged that private conduct, no matter how discriminatory or wrongful, was beyond the reach of 42 U.S.C. §1983. *Sullivan*, 143 L.Ed.2d at 143. This Court emphasized that state action requires both an alleged deprivation caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible, and that the party charged with the deprivation be a person fairly said to be a state actor. *Id.* at 143-44. This Court noted that state regulation does not by itself convert a private entity's action into state action, and that action taken by private entities with the mere approval or acquiescence of the state also is not state action. *Id.* at 144-45.

This Court in *Sullivan* distinguished *West v. Atkins*, 487 U.S. 42 U.S (1988), a decision upon which Judge Merritt in dissent below and Brentwood Academy here rely heavily. The Court noted that in *West*, the State was constitutionally obligated to provide medical treatment to injured inmates, and the delegation of that traditionally exclusive public function to a private person gave rise to a finding of state action. *Id.* at 147. However, in *Sullivan* there was no state constitutional or statutory requirement obligating the State to provide the benefits at issue.

The issue here involves an activity, interscholastic athletic competition, which the State is not required to provide either by Constitution or by statute. Contrary to Brentwood Academy's assertion, the public schools' educational programs are indeed separate from those schools' athletic programs. The state exercises regulatory authority over the educational programs in public schools. The state requires that certain course offerings be provided by the public schools and that certain credits be achieved in order to graduate from a public school. The state exercises no regulatory authority over interscholastic athletics in the public schools. Interscholastic athletic competition is simply sports competition between different schools. While it is an activity that may be enjoyable and sometimes valuable, it is *not* an integral part of the public education governed by the state. There is no state law requiring any public school to conduct an interscholastic athletic program of any type, nor is there any state law which regulates what competitive sports a school must offer or how it must conduct any interscholastic athletic program it chooses to implement. No school in Tennessee is required by Constitution or by statute to join TSSAA.[8] *West* is inapplicable here just as it was inapplicable in *Sullivan*.

[8] Contrary to Brentwood Academy's assertion, TSSAA does not control state interscholastic athletic championships. See Petition p. 14 n. 7. TSSAA controls TSSAA championships. There is no law prohibiting public or private schools from withdrawing from TSSAA and forming a separate organization with its own championships.

The decision about whether to engage in interscholastic athletic competition, for both public and private schools, is a decision over which the state exercises no compulsion. A determination of what sports to offer for interscholastic athletic competition, for both public and private schools, is a decision over which the state exercises no compulsion. The decision to join TSSAA, for both public and private schools, is a decision over which the state exercises no compulsion. There is no requirement under the Constitution of Tennessee or under state law that the state provide interscholastic athletics, in any particular sport or at all, in its public schools or that the state do so under the auspices of TSSAA.

The Sixth Circuit's determination that TSSAA is not a state actor is consistent with the principles announced by this Court in the *Blum* trilogy, consistent with this Court's decision in *United States Olympic Committee*, consistent with the Court's analysis in *Tarkanian*, and consistent with this Court's rationale in *Sullivan*.

III. SUPREME COURT REVIEW IS UNWARRANTED.

Brentwood Academy suggests in its petition that this case is of national importance because of its impact on school choice and because of issues of accountability. Brentwood Academy's school choice argument is pure fantasy with no basis in fact. Brentwood Academy's accountability argument misconstrues the role of government and of the courts under our Constitution.

Brentwood Academy suggests that the TSSAA recruiting rule restricts the ability of independent schools to seek out students by informing them of educational opportunities, and that the rule also makes it more difficult for students and parents to learn about alternative educational options, including financial aid. There is no evidence whatsoever to support this assertion. The TSSAA recruiting rule simply does not "flatly bar" any private

school from contacting a student enrolled at a public school. The lynch pin of the recruiting rule is that it addresses efforts to secure a student "for athletic purposes." The rule does not address "educational opportunities." Nothing in the rule prohibits a private school from informing prospective students about educational opportunities at the school. Indeed, private schools in general, and Brentwood Academy in particular, have flourished while also complying with the TSSAA recruiting rule. Compliance with the rule has not prevented private schools like Brentwood Academy from filling their available enrollment and from having waiting lists of prospective students hoping for vacant seats. There are numerous ways for Brentwood Academy to inform prospective students of the educational opportunities offered by a private school without running afoul of the recruiting rule's prohibition against attempting to secure the attendance of a student for athletic reasons. The recruiting rule does not prevent Brentwood Academy from supplying general information, including information about the school calendar, the academic offerings, the availability of financial aid, and even athletics, to prospective students. It is the singling out of students for athletic reasons, e.g. the athletic director and football coach contacting twelve particular male prospective students to invite them to attend spring football practice prior to their enrollment at the school, against which the recruiting rule guards.

In addition, Brentwood Academy tries to paint a view of TSSAA as an organization that fosters a purported proprietary interest in students by the public schools, and an organization that views students as a means to an end, a sports championship for a public school team. Brentwood Academy's argument in this regard is an effort to turn the tables, painting itself as the occupant of a higher moral ground where the only interest is in fostering educational opportunities for children. There is no evidence to support any of these arguments or assertions by Brentwood Academy. Indeed, the evidence is to the contrary.

The express purpose of the TSSAA recruiting rule is to treat athletes and prospective athletes no differently than students who are not athletes, so that education remains the foremost concern and so that eighth graders are not recruited for athletics by high schools in the same fashion that seniors are recruited for athletics by colleges. On the other hand, there cannot be found, among the recruiting rule violations by Brentwood Academy, an effort to inform a student or his family about educational alternatives. The recruiting rule violations here all pertained to the Brentwood Academy football program. No officials of Brentwood Academy associated with academic areas of study were involved in the recruiting rule violations. All of the acts found to be in violation of the recruiting rule were the acts of Carlton Flatt, the athletic director and head football coach at the school.

In *Crocker v. Tennessee Secondary School Athletic Association*, 980 F.2d 382 (6th Cir. 1992), the Sixth Circuit noted:

> "[TSSAA] is ordinarily entitled to enforce its athletic rules in order to deter students, parents and school officials from trying to turn high school athletics into an activity that overshadows or unduly interferes with academic life. The main purpose of high school is to learn science, the liberal arts and vocational studies, not to play football and basketball." *Id.* at 386-87.

While Brentwood Academy waxes eloquent about alternative educational opportunities, this case is little more than *Crocker* pursued by an institution rather than an individual. Brentwood Academy's claims are not about academic opportunities for prospective students, nor are they about true First Amendment concerns. This case is about high school sports, an activity that is purely optional for students and, indeed, for the schools themselves.

Brentwood Academy's argument about "accountability" should be rejected out of hand. Brentwood Academy suggests, apparently as a matter of general policy, that TSSAA should be subject to suit under federal statutory or constitutional law. Neither the Constitution nor the federal statutes which implement constitutional protections are intended to apply to every person or entity. Indeed, the limited application of the Constitution is precisely why the state action requirement is a part of 42 U.S.C. §1983. As this Court recently noted in *Sullivan*, *supra*, private conduct, no matter how discriminatory or wrongful, is beyond the reach of 42 U.S.C. §1983 and the Fourteenth Amendment. *Sullivan*, 143 L.Ed.2d at 143 (quoting *Blum*, *supra*, 457 U.S. at 1002).

The framers never intended that the constitutional requirement of equal protection be imposed upon every person or entity, and Congress never intended that 42 U.S.C. §1983 be used as a vehicle to impose constitutional requirements on private actors. The state action requirement exists to protect against overexpansive government which might otherwise intrude unnecessarily into the private realm. *Lugar*, 457 U.S. at 936.

This Court's decisions regarding the NCAA show the folly of Brentwood Academy's assertion. In *NCAA v. Smith*, 119 S.Ct. 924 (1999), this Court held that the NCAA was not subject to suit under Title IX. As Brentwood Academy asserts, the same analysis would apply to a Title VI claim, leaving the NCAA free of scrutiny under either provision. Because *Smith* would seemingly apply to state associations like TSSAA, Brentwood Academy suggests that this Court should not affirm a decision from the Sixth Circuit that would also immunize TSSAA from scrutiny under constitutional law. However, this Court's *Tarkanian* decision, when combined with *Smith*, leaves the NCAA in precisely the position that Brentwood Academy insists TSSAA should not occupy. Under *Tarkanian* the NCAA is not a state

actor under 42 U.S.C. §1983, and under *Smith* the NCAA is not subject to suit under Title IX or Title VI. Certainly the sphere of influence of the NCAA is much broader than the sphere of influence of TSSAA, whose activities are confined to a single state. There is no greater reason to impose accountability under federal law or constitutional law upon TSSAA than there was upon the NCAA when this Court decided *Tarkanian* and *Smith*.

Simply put, the question is not whether it is a good idea to hold TSSAA accountable. The question is whether TSSAA is a state actor under §1983.[9] There is no general principle of constitutional or statutory "accountability" upon which the courts may or should rely to assert federal jurisdiction over the acts of private citizens or entities.

CONCLUSION

There are no compelling reasons for this Court to review the decision of the Sixth Circuit in this case. The Sixth Circuit's decision is consistent with this Court's instruction, since the *Blum* trilogy, on resolving the state actor question. When limited to cases where the status of a state athletic association as a state actor has been analyzed, rather than simply assumed, there is no inconsistency among the circuits. Finally, there are no compelling policy reasons why this Court should review the Sixth Circuit's decision.

Instead, as a matter of policy the Court should decline to review this case further. In *OHSAA v. Bray*, 321 F.2d 269, 273 (10th Cir. 1963), the Tenth Circuit stated:

> "The potential jurisdiction of the Civil Rights Act cannot be used as a sham for a review of the acts of the Board of Control which do not involve a civil right."

[9] Like UNLV in *Tarkanian*, any public school member of TSSAA remains subject to the requirements of the civil rights laws, even if it means the school must withdraw from TSSAA to comply with those laws.

Brentwood Academy is using 42 U.S.C. §1983 as a sham. This case is not about free speech. It is not about Brentwood Academy's desire to inform students of educational opportunities. This case is about Brentwood Academy's desire to claim TSSAA athletic championships without having to follow the TSSAA rules, rules it agreed to follow when it voluntarily joined TSSAA. This is a case about high school sports. As Judge Posner noted in his dissent in *Crane v. Indiana High School Athletic Association*, 975 F.2d 1315, 1328 (7th Cir. 1992) (J. Posner, dissenting), constitutional issues raised by this challenge to the TSSAA recruiting rule are *insubstantial* in "our sports obsessed society."

Brentwood Academy, a small, private, college preparatory school, has an enduring record of football success. The goal of the TSSAA recruiting rule is to prevent a sports-obsessed school from treating school-aged children as athletes first and students second. Brentwood Academy ran afoul of that rule, a rule it expressly agreed to follow. Brentwood Academy then devised a constitutional vehicle to use in an effort to dictate which rules it would choose to follow as a member of TSSAA. The fact that this case has reached this level is a sign of just how "sports-obsessed" our society has become. The Sixth Circuit's decision was correct, and this Court should deny Brentwood Academy's petition.

Respectfully submitted,

W. Ovid Collins, Jr.
CORNELIUS & COLLINS
Suite 2700, Nashville City Center
511 Union St.
P.O. Box 190695
Nashville, Tennessee 37219
(615)244-1440

Counsel of Record

Charles Hampton White
Richard L. Colbert
CORNELIUS & COLLINS
Suite 2700, Nashville City Center
511 Union Street
P.O. Box 190695
Nashville, Tennessee 37219
(615)244-1440

Attorneys for Respondents